Supreme Court, U.S.
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No. 92-969

IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH P. NAPOLI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER JOSEPH NAPOLI'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph P. Napoli, pro se, respectfully submits this Reply to correct certain factual assertions made by the government in its brief in opposition.

In its opposing brief, at pp 11-12, par 4, of the Argument, the government

incorrectly stated that Petitioner did not argue in the Court of Appeals that, because he was merely "of counsel" to the firm, he "'did not participate in the conduct of [the] enterprise's affairs within the meaning of [the] RICO statute'", citing Reves v Ernst & Young, 112 S.Ct. 1159 (1992) (No. 91-886).

This argument was expressly raised in Petitioner Napoli's Brief submitted in Reply to the government's answering brief, at Point VI, pp 27-30, and was raised again in connection with his Petition for Rehearing, with a suggestion for Rehearing En Banc, at Point I, pp 8-11. In each instance, the Reves case was cited. No application was made by the government to strike the Point from Petitioner's Brief and, in its decision affirming the convictions, the Second Circuit, without commenting on that and other issues, said "[w]e have considered appellants' other

arguments and find them to be without merit" (Pet. App. 45a).

The question presented in Petitioner Napoli's Petition, subd 1, pp 15-20, was "'pressed [and] passed upon below'" and is therefore reviewable by this Court (United States v Williams, __ U.S. __, 112 S.Ct. 1735, 1738-41).

Similarly unavailing are the government's contentions at pp 8 N.3, and at p 13 N.9, that petitioner did not present his claims to the Court of Appeals that the trial court did not properly instruct the jury regarding the "understanding" element of the state law offense (bribery), and that the trial court erred in declining to conduct a hearing on juror taint, respectively. The contention that the trial court did not properly instruct the jury was raised in Petitioner's Brief, Point III, pp 64-5. With regard to the trial court's failure to

conduct a hearing, that issue too was specifically raised in Petitioner's Brief Point V, p 97 and in Point I, pp 3-5, of his Brief in Reply.

The government's observations at pp 6-7 concerning Petitioners' arguments about the meaning of "chargeable under State Law" (18 U.S.C. § 1961 [1][A]), are simply wrong. The point is that under New York law accomplice corroboration is a component of a legally sufficient case which the State is obligated to establish (see N.Y. Crim.Pro.L. 70.10 and 70.20). Similarly the meaning of "understanding" in the New York statute defining bribery, is subject to New York and not federal law. The trial court did not include in its charge to the jury on state bribery the meaning of "understanding" recently articulated by the New York Court of Appeals in People v Bac Tran, 80 N.Y.2d 170 (1992).

Finally, Petitioner adopts the arguments set forth in the Petition of Alan Weinstein at Point II, pp 18-26, concerning the use of mail fraud as a predicate act in a RICO prosecution to disguise what was essentially state perjury racketeering acts, to supplement the arguments made in Point IV, pp 35-38 of the Petitioner Napoli's brief.[1]

For the foregoing reasons, the Petition should be granted.

Dated: February 2, 1993

Respectfully submitted,

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[1] Petitioner Alan Weinstein was one of the seven defendants in United States v Morris J. Eisen, et al., who was convicted and appealed to the United States Court of Appeals for the Second Circuit. Petitioner Weinstein filed his Petition after Petitioner Napoli filed his.